

**ORIGINAL**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of

Implementation of Section 309(j)  
of the Communications Act -  
Competitive Bidding

To: The Commission

)  
)  
) PP Docket No. 93-253  
)  
)  
)

RECEIVED  
JUN - 3 1994  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**PETITION FOR PARTIAL RECONSIDERATION  
OF SOUTH DAKOTA NETWORK, INC.**

Benjamin H. Dickens, Jr.  
John A. Prendergast

Blooston, Mordkofsky, Jackson  
& Dickens  
Suite 300  
2120 L Street, NW  
Washington, DC 20037  
(202) 659-0830

Filed: June 3, 1994

No. of Copies rec'd 0+11  
List ABCDE

## TABLE OF CONTENTS

Summary . . . . .	i
I. STATEMENT OF INTEREST . . . . .	2
II. CONGRESS HAS MANDATED RURAL TELEPHONE COMPANY PARTICIPATION . . . . .	3
III. THE COMMISSION SHOULD REVISE THE DEFINITION OF "RURAL TELEPHONE COMPANY" TO BETTER REFLECT THE REALITIES OF THE INDUSTRY . . . . .	7
A. THE COMMISSION SHOULD DELETE THE TERM "INDEPENDENTLY OWNED AND OPERATED" FROM THE RURAL TELCO DEFINITION . . . . .	12
IV. THE COMMISSION MUST PROVIDE MEANINGFUL BENEFITS TO RURAL TELCOS, IN ORDER TO ENSURE THEIR PARTICIPATION . . . . .	13
A. RURAL TELCO BID CREDITS MUST BE MEANINGFUL . . . . .	13
B. RURAL TELCOS SHOULD BE ENTITLED TO INSTALLMENT PAYMENTS . . . . .	17
C. THE COMMISSION SHOULD ENSURE A PCS SET-ASIDE FOR DESIGNATED ENTITIES . . . . .	18
V. THE COMMISSION MUST ALLOW THE FORMATION OF CONSORTIA AMONG DESIGNATED ENTITIES AND SOURCES OF CAPITAL . . . . .	20
VI. CONCLUSION . . . . .	23

## SUMMARY

South Dakota Network, Inc. (SDN) urges the Commission to reconsider and/or clarify certain aspects of its auction rules. In order to carry out its Congressional mandate to ensure a meaningful opportunity for rural telephone companies to participate in spectrum auctions, the Commission should revise the definition of "rural telephone company" to allow carriers to qualify if they have 50,000 or fewer access lines or serve no community with greater than 10,000 inhabitants. SDN alternatively supports suggestions by other members of the industry that a simple 100,000 access line or \$100 million revenue definition be used. Any of these revised definitions would better reflect the realities of the rural telco industry.

The Commission should also provide meaningful benefits to rural telcos, including a substantial bid credit. This credit should not be tied to a requirement to provide coverage beyond the requirement for other entities, since rural telcos are already serving the highest cost-lowest revenue portions of the country. Likewise, there should be no penalty for a failure to achieve this excess build-out, given the adverse conditions faced by rural telcos (including harsh terrain, weather, and lack of available resources). If the Commission wishes to create an incentive for build-out to rural areas, it should give rural telcos an additional credit for extending service to their certificated areas. The Commission should also allow rural telcos to pay by installment

payments, since any of the proposed definitions of rural telephone company require that the carrier be a small telephone company. The Commission should further retain its proposed PCS spectrum set-aside, and should adopt set-asides for other emerging technologies. Without a set-aside, the Commission cannot ensure designated entity participation, especially since investors often require this benefit in order to commit to a designated entity.

Finally, the Commission should allow rural telcos to form consortia among themselves, since the combining of such telcos does not change their rural nature. Moreover, rural telcos should be allowed to form consortia with investors, so long as they retain at least 50.1% equity and control.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

RECEIVED  
JUN - 3 1994  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act - ) PP Docket No. 93-253  
Competitive Bidding )  
 )  
To: The Commission )

**PETITION FOR PARTIAL RECONSIDERATION**  
**OF SOUTH DAKOTA NETWORK, INC.**

South Dakota Network, Inc. (SDN) and its 15 member rural telephone companies, by their attorneys and pursuant to Rule Section 1.106, hereby petition the Commission to reconsider various aspects of its Second Report and Order in PP Docket No. 93-253, Mimeo No. FCC 94-61, 59 Fed. Reg. 22,980 (May 4, 1994). As detailed below, the Commission's newly adopted auction rules fail to carry out the Congressional mandate to "ensure" a meaningful opportunity for rural telephone companies to participate in the provision of personal communications services (PCS) and other emerging technologies. The rules as adopted create a classic "catch 22" for these entities: if they are small enough to qualify for the benefits to be accorded to so-called "designated entities", then they lack the financial wherewithal to have any realistic chance of obtaining a license and constructing and operating an advanced telecommunications service; on the other hand, if these entities try to pool their efforts, or otherwise attract capital, they will be stripped of their designated entity status and the related benefits. These carriers would therefore have to compete with the largest telecommunications firms in the marketplace

without any assistance whatsoever. Under either scenario, the chances of rural telephone companies obtaining PCS licenses in the upcoming auctions are negligible under the new Rules.

In support of this Petition, the following is shown:

**I. STATEMENT OF INTEREST.**

SDN is a corporate entity created by 15 rural telephone companies, for the purpose of bringing centralized equal access and advanced telecommunications services to rural South Dakota. The equal access system is comprised of a fiber optic network connecting a tandem switch located in Sioux Falls, South Dakota with 113 participating rural exchanges. The network already serves as the platform for numerous advanced telecommunication services, including screening for wide-area telephone service ("WATS") and WATS-type services; access to emergency medical services; access to law enforcement, fire and other emergency services via Enhanced 911 service; and Signaling System 7 ("SS7") services. This fiber network will also facilitate the delivery of other services in the planning stage, such as distance learning programs, telemedicine programs, and two-way interactive video transmission for educational, medical and governmental use.

SDN has closely followed the emerging technologies and related rulemakings, and its members have participated in these rulemakings through comments filed by SDN, and by various telephone associations to which they belong. SDN and its rural telephone members desire to provide PCS and other emerging technologies in rural South Dakota. Due to their access to the existing SDN fiber

based centralized equal access network and tandem switch, SDN and its members already have in place a back-bone network for PCS which will greatly enhance the feasibility of providing these services in an affordable manner to sparsely populated South Dakota. However, the Commission's definition of "rural telephone companies", the nature of the benefits to be accorded to these entities, and the restrictions on the formation of consortia, will act to prevent any meaningful participation by SDN or its members in PCS. Accordingly, SDN is compelled to urge the Commission to take a second look at these rules.

## **II. CONGRESS HAS MANDATED RURAL TELEPHONE COMPANY PARTICIPATION.**

The Omnibus Budget Reconciliation Act of 1993 ("OBRA") revised Section 309 of the Communications Act of 1934, as amended (the Act), to authorize the Commission to grant licenses by competitive bidding. Spectrum auction legislation has been introduced numerous times in the past several years, but has failed because of strong concerns that auctions would concentrate valuable FCC licenses into the hands of the largest telecommunications firms. Such a result would frustrate overriding public policy goals, such as the implementation of universal telecommunications service to rural America, the protection of small businesses, the distribution of licenses to diverse groups over a wide geographic area, and participation in the telecommunications field by minorities and woman. OBRA has addressed these concerns by identifying four groups of "designated entities": Rural telephone companies (or "rural telcos"), small businesses, businesses owned by minorities

and businesses owned by women. In order to protect these groups, and thereby avoid the potential detriments of spectrum auctions, Congress set up several protections in OBRA. Paragraph 3 of amended Section 309(j) instructs that the Commission:

shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(A) the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delay;

(b) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority business groups and women;

See Section 6002(a) of OBRA (emphasis added).

Rather than leaving the protection of these groups as a mere "licensing objective", Congress created Section 309(j)(4) of the Act, to mandate that the Commission adopt specific protections. In particular, Section 309(j)(4)(D) requires that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;..." (emphasis added).

Other parts of OBRA make it clear that ensuring an equitable distribution of licenses among geographic areas and economic opportunity for a wide variety of applicants is only one reason for



mandating participation by rural telephone companies. The other reason is to ensure that rural America is not left in the backwaters of the telecommunications revolution, since the remoteness of rural areas makes enhanced services such as PCS all the more important in promoting safety, education and a higher standard of living. Indeed, Section 309(j)(12)(E)(iii) requires the Commission to evaluate whether and to what extent "competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users," over and above the need for the Commission to evaluate whether the designated entities have been able to participate successfully in the auction process.

These numerous expressions of concern by Congress, and explicit instructions for the Commission to act on these concerns, can only mean that Congress did not want the Commission to merely provide a theoretical opportunity for the designated entities to participate in auctions; instead, this opportunity must be a meaningful one, such that when the auctions are completed, there will indeed be licenses in the hands of rural telephone companies and the other designated entities.

The importance of adopting effective measures to ensure designated entity participation cannot be understated, especially with regard to rural telephone companies. For PCS auctions, each licensed area (whether it is a Basic Trading Area [BTA] or Major Trading Area [MTA]) contains at least one urban area, surrounded by less populated areas. While PCS licensees will ultimately be

under a 90% build-out requirement, the demographics of many Midwest and Western states are such that PCS licensees will be able to meet this 90% requirement by covering little more than the urban area and perhaps some of the surrounding counties.<sup>1</sup> However, many rural areas will be left to wither on the vine, because of the perceived unprofitability of building out to these areas. And because each PCS licensee will be awarded the entire geographic area within their BTA or MTA, there is a real possibility that rural areas will go unserved by any PCS system, since all licensees are likely to focus on the urban profit centers.

An important partial solution to this dilemma is a partitioning mechanism which would allow rural telcos to build-out PCS within their certificated service area, either pursuant to an agreement with the overall BTA or MTA licensee, or by licensing a separate PCS area using a system similar to the cellular "unserved area" application process. SDN strongly favors the adoption of a partitioning mechanism by the Commission, as explained in greater detail in its April 22, 1994 Statement in General Docket No. 90-314 (commenting on the Commission's open panel on PCS). However, even the adoption of an effective partitioning mechanism may not be a suitable remedy in all instances, and would not ensure rural telco participation. In some

---

<sup>1</sup>See Ex Parte presentation of the Western Alliance, filed February 14, 1994 in this proceeding. Statistical examples submitted therein show that 90% of the population of the El Paso BTA can be covered by serving only one of four counties in the BTA; the Las Vegas BTA can be covered by serving only two of five counties; and the Salt Lake City BTA can be covered by serving only seven of 20 counties.

very sparsely populated areas of the country (including portions of South Dakota), it may be necessary for rural telcos to serve both the "urban" and rural areas within a given BTA, in order to provide an economically viable service. Therefore, the Commission must adopt auction rules that will give rural telcos a realistic chance to bring PCS and other emerging technologies to their rural service areas.

It is against the back-drop of the above-described Congressional mandate that the new auction rules must be examined. Although it is clear that both the Commission and the industry are in a hurry to bring PCS to the market place (as was evident at the Commission's Open Panel discussion), expediency and budgetary concerns should not override the need to carry out Congress' instructions. It will be much more expensive and disruptive to correct any infirmity after the auctions have been held.

**III. THE COMMISSION SHOULD REVISE THE DEFINITION OF "RURAL TELEPHONE COMPANY" TO BETTER REFLECT THE REALITIES OF THE INDUSTRY.**

In defining rural telephone companies as designated entities, the Commission wisely abandoned the "2,500 inhabitants" standard of Rule Section 63.58, and adopted the industry suggestion that rural telephone companies not serve communities of greater than 10,000 inhabitants. See, Second Report and Order, at para. 282. However, the Commission appears to have misconstrued the record in this proceeding, by adopting a "50,000 access line" size limitation on rural telephone companies, as an additional restriction rather than as an alternative test. The Second Report and Order states

(at para. 281) that "a number of other commentators also suggest that the definition of rural telephone companies should include a limitation on the size of the company." However, the comments cited to by the Commission do not stand for the principle that the size of the rural telephone companies should be an additional ground for exclusion; instead, these parties were advocating that rural telephone companies who may not qualify under even the 10,000 population standard may nonetheless be rural in nature, and on the basis of their size (50,000 access lines or less) should be allowed to take advantage of the preferences to be accorded to this class of entities. The Commission cites to the comments of the Organization for Protection and Advancement of Small Telephone Companies (OPASTCO) in stating that "'the problem such companies face in the competitive bidding arena' it is as much a function of their size as of the rural character of their service areas." Second Report and Order, at para. 281. This quoted language stands for the proposition that rural telco benefits should accrue not only to telephone companies serving sparsely populated areas, but also to small telephone companies.

OPASTCO, the National Telephone Cooperative Association (NTCA) and most other representatives of the rural telephone industry advocated that the Commission adopt a two-prong definition, which would afford benefits to any rural telephone company which either (1) did not serve any community of 10,000 or more inhabitants; OR

(2) had 50,000 or fewer access lines.<sup>2</sup> Unfortunately, the Second Report and Order has turned this more flexible definition into an unduly restrictive one, by using the word "and" instead of "or", thereby turning the dual grounds for qualification into a double restriction.

The Commission's justification for this restrictive definition is not found in the record, and as explained above, the only commentors on this issue have been misinterpreted. The only word of explanation provided by the Commission is that "we do not believe Congress intended for us to give preferences to large LECs that happen to serve small rural communities." Id., para. 282. There is no citation to the legislative history or the statute itself for this proposition, and indeed, the OBRA does not state or imply that rural telephone companies include only "small" rural telephone companies.

To the extent that the Commission is concerned that large LECs would unduly benefit from rural telco status, the definition proposed by the rural telco industry prevents such a result. When the 10,000 population/50,000 access line criteria are applied as alternative tests, only the appropriate-sized carriers are allowed to participate with auction preferences. If the 10,000 population/50,000 access line criteria are cumulative exclusions, a number of small telephone companies serving rural areas will be excluded from a meaningful opportunity to obtain a PCS license.

---

<sup>2</sup> See Comments of OPASTCO at pp. 4-7; Comments of National Telephone Cooperative Association (NTCA) at pp. 7-8; February 14, 1994 Ex Parte presentation of Western Alliance.

For instance, the City of Brookings Telephone Department is a member of SDN. It has well below 50,000 access lines, and yet would be excluded under the Commission's proposed definition, since it serves approximately 16,000 inhabitants, many of whom are college students who are absent for part of the year. It defies logic to think that a telephone carrier of this size will be able to effectively compete with larger applicants for a PCS license. Even at the BTA level (the smallest license size), Brookings County is part of the Sioux Falls, South Dakota BTA. Since the City of Sioux Falls has a population more than 6 times greater than the City of Brookings, it is likely that more well-heeled applicants will successfully bid for this license, and may never see fit to extend service to the City of Brookings.

Thus, the Commission should utilize the alternative definition proposed by the rural telco industry, rather than the dual restriction it has adopted. It is noteworthy that during the press conference following the adoption of the Second Report and Order in this proceeding, the Commission's representative indicated that the proposed definition of rural telephone company would exclude only the 29 largest telephone carriers in the country. This statement would be true if the alternative definition proposed by the industry had indeed been adopted, since based on 1992 statistics, 29 telephone carriers had 50,000 or more access lines. However, as adopted, the Commission's current definition would not only exclude those 29 largest carriers, but would also exclude many smaller rural telephone companies that happen to have a community

with slightly over 10,000 within their certificated area.

The proposed industry definition will adequately serve to prevent the large LECs from taking undue advantage of the auction procedures, while retaining the flexibility to help those carriers that otherwise will not have a realistic opportunity to participate in PCS. Accordingly, the Commission should revise its definition to utilize the word "or" instead of "and".

SDN is aware of the proposal of various rural telephone industry members to modify the definition of rural telephone company to either 100,000 access lines, or the \$100 million annual revenue mark already used by the Commission to define a small telephone company. See June 2, 1994 Ex Parte letter of US Intelco, Minnesota Equal Access Network Service, Inc., Western Alliance, et al. SDN supports these proposed alternative definitions, either of which will provide a more simplified and realistic designation of entities qualifying as a rural telephone company.

**A. THE COMMISSION SHOULD DELETE THE TERM "INDEPENDENTLY OWNED AND OPERATED" FROM THE RURAL TELCO DEFINITION.**

In wording the definition of "rural telephone companies," the Second Report and Order has interjected the terms "independently owned and operated" for the first time. This term was added to the definition without any discussion whatsoever in the Second Report and Order or in the original Notice or Proposed Rulemaking. It is respectfully submitted that this term is unnecessary to achieving the Commission's goals, and will create confusion and exclude bona fide rural telephone companies from the auction process.

The Second Report and Order (at para. 282) indicates that

rural telephone companies must serve 50,000 or fewer access lines, "including all affiliates." However, this affiliation language is missing from the text of the newly adopted Rule Section 1.2110(b)(3). It would appear that the term "independently owned and operated" is intended to reflect that the 50,000 access line limit refers to the applicant and its affiliates, but this term is subject to multiple interpretations. For instance, many rural telephone companies have set up holding companies, in order to facilitate the provision of non-regulated services (such as paging) to their customers. Others have created entities such as SDN, in order to provide equal access (and the competitive benefits thereby fostered), SS7, and other benefits to their respective members that could not be provided by each individual telephone company on its own. It would be inimical to both Congress' mandate and the Commission's own stated objectives to exclude such small, rural telephone companies simply because they have established an ownership structure to facilitate provision of enhanced telecommunication services to the rural communities they serve, or for other valid purposes.<sup>3</sup> Accordingly, the Commission should strike the words "independently owned and operated" from the

---

<sup>3</sup>On the other hand, the Commission and the Courts have historically utilized the term "independent" telephone company to refer to local exchange carriers that are not Bell operating companies. See, Report and Order, 100 FCC 2nd 860, 861-871 (1985); Report and Order (800 Service Access), 4 FCC Rcd 2824, 2825 (1989); United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1981), aff'd sub nom. Maryland v. the United States, 460 U.S. 1001 (1983). It would not appear that the Commission intends such a liberal definition of rural telephone company in using the "independently owned and operated" language. Thus, a clarification is sorely needed, to reflect the reasonable interpretation described above.



definition, and insert the words "including affiliates" after the 50,000 access line limitation. Again, as discussed above, this 50,000 access line limitation should be modified to serve as an alternative definition rather than a dual restriction.

**IV. THE COMMISSION MUST PROVIDE MEANINGFUL BENEFITS TO RURAL TELCOS, IN ORDER TO ENSURE THEIR PARTICIPATION.**

The only benefit accorded to rural telcos in the Second Report and Order is a bid credit that is tied to the amount by which a telephone company exceeds the build-out requirement for a particular service. In the absence of further modifications in future service-specific auction orders, it appears that rural telcos will not be entitled to installment payments, or royalty payment plans. The status of tax certificates, distress sale benefits, and spectrum set-asides are unknown at this time.<sup>4</sup> Therefore, even if a rural telco is able to qualify as a designated entity, it appears that the benefits of this status will be illusory at best.

**A. RURAL TELCO BID CREDITS MUST BE MEANINGFUL**

It is ironic that rural telephone companies, the entities that have a proven record of bringing telecommunications to the highest cost, lowest revenue areas of the country, will be saddled with a more onerous build-out requirement than any other applicant. A sizable minority business enterprise constructing a system in the highly populated New York BTA may be entitled to a bid credit for merely meeting the build-out requirement. On the other hand, a

---

<sup>4</sup>See, discussion of spectrum set-asides, infra.

small telephone company proposing to bring service to a BTA in rural South Dakota will only accrue some portion of a bid credit, based on the amount by which it exceeds the already burdensome 90% population coverage requirement. Rural telcos proposing to construct within their certificated area should be under a less burdensome build-out requirement, rather than the reverse. In New York City, the minority business enterprise may be facing population densities of several hundred people per square mile, thus lowering construction costs and ensuring a sizeable revenue stream almost immediately. In rural South Dakota, this population density may be a few people per square mile. Under the Commission's proposed rural telco bid credit, any benefit derived from qualifying as a rural telco will be more than offset by the increased construction costs in having to exceed the 90% coverage requirement.

Moreover, unlike any other designated entity, the rural telcos face the threat of a penalty if the promised excess build-out proposal is not met. This penalty will have a chilling effect on rural telco participation in PCS and other emerging technologies, and will thereby inhibit the provision of these services to rural America. Accordingly, this penalty violates the mandate of OBRA. Unlike any other participants in the auction, rural telephone companies have undertaken a public service obligation to bring universal service to their certificated areas. Their exemplary track record in bringing telecommunication services to rural Americans is a matter of record at the Commission.

By the same token, it is also well established that prohibitive terrain, weather conditions and other construction costs can sometimes make the implementation of these services impossible. Indeed, rural telcos by their nature must be flexible, and ready to explore alternatives to accomplish their service objectives. Thus, where wireline telephone service cannot be brought to remote areas, the Basic Exchange Telecommunications Radio Service has been developed as a substitute. Similarly, it is not known whether rural telephone companies will be able to bring the benefits of PCS to 100% of the population of the BTA which contains their certificated area. This is certainly the goal of each telephone company, but it cannot embrace the project if it must do so at the threat of severe penalties if it falls at all short of this goal.

Furthermore, the Commission's "excess build-out" requirement may force rural telcos to adopt a construction strategy which will delay service to their rural certificated areas. Any rural telco that is able to obtain a PCS license will in all likelihood want to construct its system in the populated portion of the BTA or MTA, as well as the rural communities it serves. In this way, revenues from the more populated areas can help finance construction to those smallest communities. However, some rural telephones may find that the more appropriate strategy for their individual circumstance is to concentrate their resources and efforts on the rural portion of the BTA or MTA, especially if the competition from multiple PCS providers clamoring to serve the urban area makes

this market unattractive. Under the Commission's "excess build-out" approach, the rural telephone company would have to commit to serve the urban as well as the rural areas, just to gain a relatively minuscule benefit.

Accordingly, the Commission should eliminate its proposed "excess build-out" requirement, and the penalty it would impose on rural telcos that are unable to meet this build-out. Instead, rural telcos should be entitled to a substantial and meaningful bid credit, like any other designated entity. Indeed, this bid credit should be higher for rural telcos, because they face far greater construction and operational costs. The Commission should be able to take official notice that rural telephone companies have not needed, and will not need a penal incentive to extend service to their certificated areas. What they need is economic empowerment to compete against industry giants in an auction environment. These carriers have devoted years of effort to bring telecommunication services to the rural communities they serve, and have subjected themselves to stringent state and federal regulations aimed at accomplishing universal service. Many rural telephone companies are cooperatives, owned by the very citizens they serve. These customer/owners will not allow their communities to be deprived of the benefits of PCS.

To the extent that the Commission wants to provide an incentive for a rural build-out, it should give rural telephone companies an additional, significant bid credit (over and above whatever bid credit all designated entities should be entitled to

in a given service) if the rural telephone company substantially covers its certificated area during the license term. In short, rural telco status should be a benefit, not a hinderance to these entities.

**B. RURAL TELCOS SHOULD BE ENTITLED TO INSTALLMENT PAYMENTS**

The Commission likewise appears to deny rural telcos the benefit of installment payments, unless these carriers qualify as a "small business." Inasmuch as the Commission has decided to limit rural telco benefits to "small" rural telcos (see discussion above), installment payments should be one of the benefits. Restricting this benefit to telcos that qualify as a small business is inadequate, because the definition of small business adopted by the Commission (\$6 million dollars net worth, \$2 million dollars average net income over the past two years) is too restrictive to take into account the cost of bringing telecommunication services to rural areas. While rural telephone companies are small in terms of the number of employees, the high cost of bringing telephone service to often mountainous, sparsely populated areas is great. Therefore, many small independent telephone companies and cooperatives will exceed the \$6 million dollar net worth test. See, April 29, 1994 Ex Parte Presentation of the NTCA in PP Docket No. 93-253 and General Docket No. 90-314.<sup>5</sup>

---

<sup>5</sup>NTCA found that 241 REA borrowers would not qualify under the current new worth definition. While some of these carriers have a significant number of subscribers, most do not. For instance, Dell Telephone Cooperative, Inc. has a net worth of more than 7 million, with only 881 subscribers. Likewise, Three River Telephone Company in Nebraska exceeds the standard with only 1,197 subscribers. These statistics reflect the great expenditures that

The Commission's exclusion of rural telcos from the installment payment benefit may be mitigated somewhat if a more liberal definition of "small business" is adopted for broadband PCS auctions (such as the \$40 million gross revenue standard suggested by the Small Business Administration's Office of Advocacy). However, as a general proposition, installment payments should be made available to rural telephone companies, since by definition they face higher build-out costs and lower revenue streams than any other group of designated entities. The sparse population in rural areas will mean that it may take several years before a steady revenue stream is realized by these telcos.

**C. THE COMMISSION SHOULD ENSURE A PCS SET-ASIDE FOR DESIGNATED ENTITIES.**

Another benefit that is vital to rural telco participation (and for that matter, participation by all of the designated entities) is a meaningful spectrum set-aside for emerging technologies. This issue will presumably be addressed for PCS in the specific broadband auction order. While bid credits will be helpful in making PCS and other emerging technologies economically feasible for the designated entities, this measure alone will not come close to ensuring a meaningful opportunity for their participation. Instead, bid credits will simply raise the cost of business for larger entities, many of whom will have no difficulty increasing their bid to offset the credit.

---

must be made to bring telecommunications service to smaller communities, especially those located where geography, weather and other conditions drive up costs.

Indeed, many designated entities are finding that, without a spectrum set-aside, they are unable to attract the interest of the investment community. If spectrum is assigned for designated entity use only, the investment community knows that when the auctions are completed, there will be designated entity licensees. Under this circumstance, investors need only choose which designated entity they believe is most likely to succeed in the auction process. However, in the absence of the set-aside, there is a likelihood that no designated entities will be successful, especially in attractive markets. Accordingly, the investment community no longer has an incentive to commit to these entities. The September 15, 1993 Report of the Commission's own Small Business Advisory Committee found that "the primary obstacle to new entrants is lack of capital." Id., at p. 2. As the Report notes (at pp. 2-3):

Debt Financing practices among institutional lenders have also been cited as a cause of debt capital unavailability to small entities, including small FCC regulatees. Acquisition and operation of regulated communication facilities is extremely capital intensive. Without a track record of ownership and substantial capital resources, new entrants typically encounter difficulties obtaining start-up-funds. Lenders are frequently reluctant to finance loans even when applicants have a track record, since FCC licenses cannot be used for collateral.

These same hurdles face designated entities looking for investors rather than debt financing. Based on these obstacles which are already a matter of record, the Commission should not succumb to pressure to reverse its proposal to set-aside PCS spectrum for designated entities. See Wall Street Journal, "FCC

May Trim Plan To Set Aside Phone Licenses." May 20, 1994, Volume CCXXIII, No. 99. Indeed, the Second Report and Order agrees with this analysis. At para. 247, the Commission states that "after consideration of the comments, we believe that, to 'ensure' the opportunity for designated entities' participation in spectrum-based services under Section 309(j)(4)(D), some spectrum may need to be set aside specifically for bidding by such entities."

In sum, the Commission will have an opportunity to remedy the paucity of rural telco benefits when it promulgates specific rules for each emerging technology, and should take advantage of that opportunity to do so.

**V. THE COMMISSION MUST ALLOW THE FORMATION OF CONSORTIA AMONG DESIGNATED ENTITIES AND SOURCES OF CAPITAL.**

The Second Report and Order has severely restricted the ability of rural telcos and others to form consortia when applying for PCS and other emerging technology licenses. For both small businesses and rural telephone companies, this approach is tantamount to an exclusion from most PCS licensing opportunities. In particular, the Commission stated that "we reject proposals to accord preferences to consortia of otherwise eligible designated entities that, when combined, result in a new entity that does not meet our definitions." Second Report and Order, at para. 286. The Commission's sole justification for this restrictive approach is its claim that "if applicants made up of a number of entities were allowed special treatment, the economic opportunity for individual qualified designated entities would be diluted." Id., at para. 287. It is respectfully submitted that the opposite is true. If



designated entities are allowed to combine their efforts, they will have a meaningful chance to succeed at auction; if they are forced to bid alone, then they are almost certainly doomed to fail. No telephone company with 50,000 or less access lines will be able to afford to construct even a BTA-sized PCS system by itself. Likewise, no business with a net worth of less than \$6 million dollars will be able to do so. This result directly contravenes the mandate of OBRA. Even the Commission's Small Business Advisory Committee has recommended that designated entities be allowed to form consortia, and has gone so far as to advocate eligibility for large cellular and local exchange carrier entities, if they agree to enter into a bona fide consortium or joint venture with new market entrants. See, SBAC Report supra at p. 12.

The Second Report and Order makes it clear that the restrictions on consortia are the general rule, which may be subject to modification with regard to particular radio services. SDN urges the Commission to make such modifications with regard to broadband PCS and other capital-intensive emerging technologies. Without the ability to attract investors, many designated entities will be unable to participate in the auction at all (given the steep upfront payment and deposit requirements), much less have a realistic opportunity to prevail. However, it is respectfully submitted that the restriction on rural telco consortia should be changed as a general rule.

Under either the currently adopted definition of rural telephone company, or the modified definition proposed above, rural